

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

|                            |   |                      |
|----------------------------|---|----------------------|
| YESILADA KREDI VE YATIRIM, | ) |                      |
|                            | ) |                      |
| Plaintiff,                 | ) | 8:05CV1              |
|                            | ) |                      |
| v.                         | ) |                      |
|                            | ) |                      |
| THOMAS C. WHITMORE,        | ) | MEMORANDUM AND ORDER |
|                            | ) |                      |
| Defendant and              | ) |                      |
| Third Party                | ) |                      |
| Plaintiff,                 | ) |                      |
|                            | ) |                      |
| v.                         | ) |                      |
|                            | ) |                      |
| DON DESORBO and CARIB CAY  | ) |                      |
| VENTURES, LTD.,            | ) |                      |
|                            | ) |                      |
| Third Party                | ) |                      |
| Defendants.                | ) |                      |

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The plaintiff has filed a motion to Alter Progression Order and for Leave to Amend Complaint. Filing 66. The plaintiff's original complaint was filed against Thomas C. Whitmore ("Whitmore"). Whitmore, in turn, filed a third party complaint against Carib Cay Ventures, Ltd. ("Carob Cay") and Don Desorbo ("Desorbo"). Whitmore's Third Party Complaint and summons to appear were served on Carob Cay and Desorbo on July 25, 2005, (see filings 42 and 43), but neither Carob Cay nor Desorbo have responded to the third party complaint, and no attorney has entered an appearance on their behalf in this lawsuit.

The plaintiff and Whitmore have entered into a settlement agreement and have filed a joint stipulation for dismissal. Filing 65. However, the plaintiff requests that any final dismissal of its action against Whitmore be held in abeyance until the court rules on the plaintiff's motion for leave to amend its complaint to name Carob Cay and Desorbo as defendants.

Whitmore does not oppose this motion. The deadline for responding to the plaintiff's motion for leave to file an amended complaint has passed and, to date, Carob Cay and Desorbo have not responded.

I note that the plaintiff's motion was not served on Carob Cay and Desorbo. However, although they are parties to this action, Carob Cay and Desorbo are parties in default for failure to appear. The plaintiff was therefore not required to serve a copy of its motion on Carob Cay and Desorbo. See Fed. R. Civ. P. 5(a) ("No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.")

The motion for leave to file an amended complaint was therefore properly served and is now ripe for determination. Having reviewed the plaintiff's proposed amended complaint, filing 67, I conclude the plaintiff's motion to amend the complaint to add Carob Cay and Desorbo as defendants should be granted. However, the caption of the proposed amended complaint should be corrected to reflect that Carob Cay and Desorbo are named defendants.

IT THEREFORE HEREBY IS ORDERED: The plaintiff's motion to file an amended complaint, filing 66, is granted. On or before December 2, 2005, the plaintiff shall file its proposed amended complaint, (filing 67), with the caption corrected to reflect that Carob Cay and Desorbo are named defendants.

DATED this 28<sup>th</sup> day of November, 2005.

BY THE COURT:

s/ *David L. Piester*

David L. Piester

United States Magistrate Judge